

## § 9701.520

labor practices, negotiability disputes, and bargaining impasses.

(d) Notice of any final action of the HSLRB under this section must be promptly served upon the parties. The action will be binding on such parties during the term of the agreement, unless the parties agree otherwise.

### § 9701.520 Standards of conduct for labor organizations.

Standards of conduct for labor organizations are those prescribed under 5 U.S.C. 7120, which is not waived.

### § 9701.521 Grievance procedures.

(a)(1) Except as provided in paragraph (a)(2) of this section, any collective bargaining agreement must provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in paragraphs (d), (f), and (g) of this section, the procedures must be the exclusive administrative procedures for grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

(b)(1) Any negotiated grievance procedure referred to in paragraph (a) of this section must be fair and simple, provide for expeditious processing, and include procedures that—

(i) Assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;

(ii) Assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and

(iii) Provide that any grievance not satisfactorily settled under the negotiated grievance procedure is subject to binding arbitration, which may be invoked by either the exclusive representative or the Department.

(2) The provisions of a negotiated grievance procedure providing for binding arbitration in accordance with paragraph (b)(1)(iii) of this section must, if or to the extent that an al-

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leged prohibited personnel practice is involved, allow the arbitrator to order a stay of any personnel action in a manner similar to the manner described in 5 U.S.C. 1221(c) with respect to the Merit Systems Protection Board and order the Department to take any disciplinary action identified under 5 U.S.C. 1215(a)(3) that is otherwise within the authority of the Department to take.

(3) Any employee who is the subject of any disciplinary action ordered under paragraph (b)(2) of this section may appeal such action to the same extent and in the same manner as if the Department had taken the disciplinary action absent arbitration.

(c) The preceding paragraphs of this section do not apply with respect to any matter concerning—

(1) Any claimed violation of 5 U.S.C. chapter 73, subchapter III (relating to prohibited political activities);

(2) Retirement, life insurance, or health insurance;

(3) A suspension or removal under § 9701.613;

(4) A mandatory removal under § 9701.607;

(5) Any examination, certification, or appointment; and

(6) Any subject not within the definition of *grievance* in § 9701.504 (e.g., the classification or pay of any position), except for any other adverse action under subpart F of this part which is not otherwise excluded by paragraph (c) of this section.

(d) To the extent not already excluded by existing collective bargaining agreements, the exclusions contained in paragraph (c) of this section apply upon the effective date of this subpart, as determined under § 9701.102(b).

(e)(1) An aggrieved employee affected by a prohibited personnel practice under 5 U.S.C. 2302(b)(1) which also falls under the coverage of the negotiated grievance procedure may raise the matter under the applicable statutory procedures, or the negotiated procedure, but not both.

(2) An employee is deemed to have exercised his or her option under paragraph (e)(1) of this section to raise the matter under the applicable statutory

procedures, or the negotiated procedure, at such time as the employee timely initiates an action under the applicable statutory or regulatory procedure or timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure, whichever event occurs first.

(f)(1) For matters covered by subpart G of this part (except for mandatory removal offenses under §9701.707), an aggrieved employee may raise the matter under the appeals procedure of §9701.706 or under the negotiated grievance procedure, but not both. An employee will be deemed to have exercised his or her option under this section when the employee timely files an appeal under the applicable appellate procedures or a grievance in accordance with the provisions of the parties' negotiated grievance procedure, whichever occurs first.

(2) An arbitrator hearing a matter appealable under subpart G of this part is bound by the applicable provisions of this part.

(3) Section 7121(f) of title 5, United States Code, is not waived, but is modified to provide that—

(i) Matters covered by subpart G are deemed to be matters covered by 5 U.S.C. 4303 and 7512 for the purpose of obtaining judicial review; and

(ii) Judicial review under 5 U.S.C. 7703 will apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by MSPB under §9701.706, including the preponderance of the evidence standard.

(4) In order to ensure consistency, the Department and representatives of those labor organizations granted national consultation rights may establish a mutually acceptable panel of arbitrators who have been trained and qualified to hear adverse action grievances under this part.

(g)(1) An employee may grieve a performance rating of record that has not been appealed in connection with an action under subpart G of this part. Once an employee raises a performance rating issue in an appeal under subpart G of this part, any pending grievance or arbitration will be dismissed with prejudice.

(2) An arbitrator may cancel a performance rating upon a finding that management applied the employee's established performance expectations in violation of applicable law, Department rule or regulation, or provision of collective bargaining agreement in a manner prejudicial to the grievant. An arbitrator who has properly canceled an employee's appraisal may order management to change the grievant's rating only when the arbitrator is able to determine the rating that management would have given but for the violation. When an arbitrator is unable to determine what the employee's rating would have been but for the violation, the arbitrator must remand the case to management for re-evaluation. Except as otherwise provided by law, an arbitrator may not conduct an independent evaluation of the employee's performance or otherwise substitute his or her judgment for that of the supervisor.

(h)(1) This paragraph applies with respect to a prohibited personnel practice other than a prohibited personnel practice to which paragraph (e) of this section applies.

(2) An aggrieved employee affected by a prohibited personnel practice described in paragraph (h)(1) of this section may elect not more than one of the procedures described in paragraph (h)(3) of this section with respect thereto. A determination as to whether a particular procedure for seeking a remedy has been elected must be made as set forth under paragraph (h)(4) of this section.

(3) The procedures for seeking remedies described in this paragraph are as follows:

(i) An appeal under subpart G of this part;

(ii) A negotiated grievance under this section; and

(iii) Corrective action under 5 U.S.C. chapter 12, subchapters II and III.

(4) For the purpose of this paragraph, an employee is considered to have elected one of the following, whichever election occurs first:

(i) The procedure described in paragraph (h)(3)(i) of this section if such employee has timely filed a notice of appeal under the applicable appellate procedures;

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(ii) The procedure described in paragraph (h)(3)(ii) of this section if such employee has timely filed a grievance in writing, in accordance with the provisions of the parties' negotiated procedure; or

(iii) The procedure described in paragraph (h)(3)(iii) of this section if such employee has sought corrective action from the Office of Special Counsel by making an allegation under 5 U.S.C. 1214(a)(1).

### **§ 9701.522 Exceptions to arbitration awards.**

(a)(1) In the case of awards involving the exercise of management rights or the duty to bargain under §§ 9701.511 and 9701.518, either party to arbitration under this subpart may file with the HSLRB an exception to any arbitrator's award. The HSLRB may take such action and make such recommendations concerning the award as is consistent with this subpart.

(2) In the case of awards not involving the exercise of management rights or the duty to bargain under §§ 9701.511 and 9701.518, either party may file exceptions to an arbitration award with the Authority pursuant to 5 U.S.C. 7122 (which is not waived for the purpose of this subpart but which is modified to apply to arbitration awards under this section) and the Authority's regulations.

(3) Notwithstanding paragraph (a)(2) of this section, exceptions to awards relating to a matter described in § 9701.521(f) may not be filed with the Authority.

(b) If no exception to an arbitrator's award is filed under paragraph (a) of this section during the 30-day period beginning on the date of such award, the award is final and binding. Either party must take the actions required by an arbitrator's final award. The award may include the payment of back pay (as provided under 5 U.S.C. 5596 and 5 CFR part 550, subpart H).

(c) Nothing in this section prevents the HSLRB from determining its own jurisdiction without regard to whether any party has raised a jurisdictional issue.

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### **§ 9701.523 Official time.**

(a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this subpart must be authorized official time for such purposes, including attendance at impasse proceedings, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this section may not exceed the number of individuals designated as representing the Department for such purposes.

(b) Any activities performed by any employee relating to the internal business of the labor organization, including but not limited to the solicitation of membership, elections of labor organization officials, and collection of dues, must be performed during the time the employee is in a nonduty status.

(c) Except as provided in paragraph (a) of this section, the Authority or the HSLRB, as appropriate, will determine whether an employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority or the HSLRB will be authorized official time for such purpose during the time the employee would otherwise be in a duty status.

(d) Except as provided in the preceding paragraphs of this section, any employee representing an exclusive representative or, in connection with any other matter covered by this subpart, any employee in an appropriate unit represented by an exclusive representative, must be granted official time in any amount the Department and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

### **§ 9701.524 Compilation and publication of data.**

(a) The HSLRB must maintain a file of its proceedings and copies of all available agreements and arbitration decisions and publish the texts of its impasse resolution decisions and the actions taken under § 9701.519.

(b) All files maintained under paragraph (a) of this section must be open to inspection and reproduction in accordance with 5 U.S.C. 552 and 552a.